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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
*Petitioner,*

*v.*

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

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## CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The cross-petitioner, American Telephone and Telegraph Company, prays that, if the Court grants a writ of certiorari in *International Business Machines Corporation* v. *Federal Communications Commission, et al.*, No. 77-1540, October Term 1977, a writ of certiorari also issue to review the closely interrelated questions set forth below, which arise from the same administrative orders and the same judgment and opinion of the United States Court of Appeals for the Second Circuit.

### OPINIONS BELOW

The judgment and opinion of the Court of Appeals appears as Appendix A to the petition for a writ of certiorari in No. 77-1540. The Report and Order of the Federal Communications Commission appears in Ap-

pendix B to that petition. The Commission's Memorandum Opinion and Order on reconsideration appears in Appendix C to that petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 26, 1978. On April 24, 1978, Mr. Justice Marshall granted a timely request for an extension of time for the filing of this cross-petition to and including May 26, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in sustaining orders of the Federal Communications Commission which eliminated long-established tariff restrictions on the resale and sharing of private line telecommunications services when, contrary to applicable requirements of the Communications Act, 47 U.S.C. §§ 151, *et seq.*, the Commission did not conduct an evidentiary hearing to resolve substantial and material questions of fact in connection with those orders.

2. Whether the Court of Appeals erred in sustaining orders of the Federal Communications Commission when the Commission did not, and could not on the basis of the record before it, rationally determine whether the elimination of long-established tariff restrictions upon the resale and sharing of private line telecommunications services is just, fair and reasonable.

## STATUTORY PROVISION INVOLVED

Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a), provides as follows:

> Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent that the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any charge other than the charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

## STATEMENT

This case arises from a proceeding initiated by the Federal Communications Commission in 1974 by a Notice of Inquiry and Proposed Rule Making, 47 F.C.C.2d 644 (1974). The Notice sought written comments addressed principally to the issue whether restrictions upon the resale and sharing of private line telecommunications services should be permitted. The Notice did not contain specific proposals for possible changes in existing requirements, but instead indicated that a First Report and Order would be issued before the Commission made any final determinations.

Restrictions upon resale and sharing have been applicable to private line telecommunications services for as long as such services have been offered. Similar restrictions have been imposed upon other telecommunications services for as long as telecommunications common carriers have existed. Throughout this period, courts and regulatory agencies have frequently sustained the lawfulness of such restrictions.[1] They have held that without restrictions upon resale and sharing layers of intermediaries will be created between common carriers and the ultimate users of their services, and the existence of such intermediaries will hamper the provision of efficient telecommunications services.

In response to the Commission's Notice, AT&T urged that an indiscriminate abolition of all such restrictions would result in severe consequences for both carriers and the public. AT&T submitted an economic impact study which constituted the only economic analysis of the consequences of such changes in the record before the Commission. The study made clear that unrestricted resale and sharing could be expected to alter the rates paid by many business customers, result in the deaveraging of national interstate telephone rates, and cause increased rates to users of intrastate services, including residential telephone subscribers. AT&T urged that such changes should not be permitted to occur without further proceedings, in which the implications of those changes could be evaluated on the basis of an adequate factual record.

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[1] *E.g.*, Wiliams & Calmer, Inc. v. Southwestern Bell Tel. Co., 70 P.U.R. (n.s.) 35, 42 (Mo. Publ. Serv. Comm'n 1947); People v. New York Tel. Co., 175 Misc. 128, 130, 122 N.Y.S.2d 837, 839 (Sup. Ct. Albany Co. 1940), *aff'd*, 262 App. Div. 440, 29 N.Y.S.2d 513 (3d Dept 1941), *aff'd*, 40 N.E.2d 1020 (1942). *See also* Private Wire Contracts, 50 I.C.C. 731 (1918); Johnson v. Mountain States Tel. & Tel. Co., 48 Utah 330, 159 P. 526 (1916).

Despite the assurance in the Commission's Notice that an interim report would be issued before any final determinations were made, the Commission announced in the Report and Order that it would not conduct any further proceedings. (App. 2b.) No opportunity was afforded the parties for an evidentiary hearing, in which factual questions raised by the Commission's abolition of restrictions upon sharing and resale could be resolved. No proceeding was held in which the economic consequences of such an abolition could be evaluated. Instead, the Commission terminated the proceedings, and adopted a final Report and Order. (App. 111b.)

The Report and Order declares, for the first time in the Commission's history, that all existing restrictions upon sharing and resale of private line communications services are unjust and unreasonable. The Commission found that existing tariff provisions permit selective sharing and resale, and jumped to the conclusion that every such restriction must therefore be in violation of the Communications Act. It reached this result by disregarding decisions by courts and regulatory agencies which have sustained limitations upon sharing and resale, and by relying instead upon cases involving transportation freight forwarding. (App. 42b-43b.) Even the Commission was compelled to concede, however, that freight forwarding and sharing of telecommunications services "may not be completely analogous...." (App. 42b, n.63.)

The Commission did not demand "detailed proof" of the asserted advantages of its new requirements. (App. 76b.) Nor did it attempt to determine the revenue impact of its orders. (App. 50b-52b.) Although the Commission did not dispute that the conduct of a com-

plete and precise economic impact study would have required more time than the Commission had permitted, it announced in conclusory terms that the study submitted by AT&T was "methodologically defective." (App. 57b.) It stated that the assumptions made in AT&T's study regarding customer behavior were not adequately supported, but did not refer to any specific evidence that was contrary to those assumptions, or indicate any of the assumptions upon which its own conclusions were based.

In a separate statement, Commissioner Hooks expressed serious doubts about the reasonableness of the Commission's orders. (App. 149b-150b.) He emphasized that the Commission had rejected AT&T's economic study without providing even "a scintilla of economic data" to buttress its own "theorems." He recognized that the Commission's actions may result in the termination of useful classes of service, and expressed fears that the "cumulative effect" of the Commission's actions may be "unwise."

The Court of Appeals for the Second Circuit sustained the Commission's orders in their entirety. Although the same court had on three previous occasions considered the applicable procedural requirements of the Act, and had, directly or by implication, reached opposite results,[1] the court held that the Commission was not required to conduct evidentiary hearings before prescribing practices as to sharing and resale. It reached that conclusion without pausing to acknowledge, far less to distinguish, its earlier inconsistent de-

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[1] AT&T v. FCC, 449 F.2d 439 (2d Cir. 1971); National Ass'n of Motor Bus Owners v. FCC, 460 F.2d 561 (2d Cir. 1972); AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973).

cisions. (App. 9a-12a.) With respect to the Commission's inadequate evaluation of the consequences of its orders, the court suggested that AT&T had not "seriously" challenged the Commission's rejection of AT&T's economic impact study (App. 14a), and held that the Commission was not compelled before acting to compute the cost and rate consequences of its orders. (App. 14a-15a.)

## REASONS FOR GRANTING THE WRIT

For reasons described in its brief in opposition, cross-petitioner AT&T believes that review of this controversy by this Court is not required, and it accordingly urges that the petition for certiorari in No. 77-1540 should be denied. If, however, the Court were to determine to grant certiorari there, it should also grant this conditional cross-petition. The questions presented here are inextricably interwoven with those presented in No. 77-1540. They arise from the same administrative orders, reviewed by the same court in a single opinion. Moreover, the administrative decision challenged in this cross-petition is the premise for the decisions challenged in No. 77-1540, and any effort to deal separately with the questions presented in that petition would prevent a complete and meaningful adjudication of this controversy.

The basic decision reached by the Commission in the orders involved here was to prohibit all existing restrictions on resale and sharing of private line services. As a consequence of that decision, the Commission recognized that various changes will occur in the private line telecommunications industry, including, among others, the development of a new "tier" of carriers which will supplement and resell those services to

the public. (App. 72b-73b.) It took various steps intended to take account of those changes. Thus, among other things, the Commission examined the activities and characteristics of resellers, and adopted forms of regulation which it found to be appropriate in the public interest. (App. 87b-101b.) The only issues presented for review by the petition in No. 77-1540 relate to the Commission's decision to regulate resellers as common carriers under the Act.

The premise of the issues presented for review in No. 77-1540 is the Commission's principal decision that it should prohibit all existing restrictions upon the resale of private line services. Without the prohibition of such restrictions, a new "tier" of resellers will not develop and the Commission's regulatory policies with respect to those resellers will have no practical or legal significance. If the Commission's prohibition of such restrictions is invalid, there will be no occasion even to consider the issues presented by IBM in No. 77-1540.

Serious doubts exist as to the validity of the Commission's order prohibiting restrictions upon resale and sharing. Even the Commission concedes that its order constitutes a "prescription" of carrier practices.[2] Its authority to make such prescriptions is derived from Section 205(a) of the Communications Act, 47 U.S.C. § 205(a). Both the Commission and the Court of Appeals have previously held that prescriptions may be made under Section 205(a) only if evidentiary hearings are held to resolve disputed questions of ma-

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[2] The Report and Order described the Commission's action as a prescription (A. 42b), and the Commission conceded in papers submitted to the Court of Appeals that it had prescribed a carrier practice. *Memorandum in Opposition to Motion for Stay Pending Judicial Review*, at 15 (Mar. 17, 1977).

terial fact.[3] The Commission's refusal to conduct such hearings in this case raises substantial doubts as to the validity of its prohibition against resale and sharing restrictions.

Those doubts are magnified by the Court of Appeals' sweeping interpretation of the decision of this Court in *United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224 (1973). The court below disregarded the unusual circumstances involved in *Florida East Coast*,[4] and derived from it a "touchstone test" for the resolution of procedural issues in a wide range of situations. (App. 10a.) It ignored this Court's recognition that the word "hearing" may have a "host of meanings," as well as the Court's refusal to provide precise or talismanic standards for determining the proper meaning in each case. *Id.* at 239.

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[3] The Commission previously recognized that evidentiary hearings are required to resolve factual disputes under Section 205(a) in, for example, In re AT&T, 2 F.C.C.2d 173, 177-178 (1976); In re California Public Utilities Comm'n, 4 P&F Rad.Reg.2d 498, 501 (1965); In re Telpak Tariff Sharing, 31 F.C.C.2d 674, 675 (1971). The Court of Appeals, directly or by implication, reached the same conclusion in AT&T v. FCC, *supra*, 449 F.2d 439; National Ass'n of Motor Bus Owners v. FCC, *supra*; AT&T v. FCC, *supra*, 487 F.2d 865.

[4] Among other things, this Court emphasized in *Florida East Coast* that the procedural requirements applicable there arose out of repeated and detailed congressional scrutiny, in which Congress left no doubt that it expected prompt action to remedy a particular crisis. *Supra*, 410 U.S. at 230-34. Moreover, Congress acted there in part after the adoption of the Administrative Procedure Act, and its choice of words could be attributed special significance in light of that Act's terms. *Id.* at 234-38. In contrast, Section 205(a) was adopted long before the Administrative Procedure Act, and has not since been altered in any relevant respect.

Moreover, the Commission's prohibition against resale and sharing restrictions was not based upon a meaningful evaluation of the consequences of its orders. The Commission disregarded its duty to explain and justify its departure from "prior norms" and thus prevented a genuine assessment of the bases of its orders or the consistency of its actions with the requirements of the Communications Act. *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade,* 412 U.S. 800, 808 (1973). *See also Secretary of Agriculture* v. *United States,* 347 U.S. 645, 653 (1954). Its failure even to attempt to analyze the revenue and service consequences of its orders meant that it did not "give reasoned consideration to the ultimate issue presented—the balancing between the costs and benefits." *Public Service Comm'n* v. *FCC,* 511 F.2d 338, 349 (D.C. Cir. 1975).

These serious questions as to the validity of the Commission's underlying prohibition against resale restrictions make clear that, if certiorari is granted in No. 77-1540, it should also be granted here. The questions presented there are collateral and subsidiary to the basic regulatory decision involved here. Unlike the questions presented here, those questions are, as shown by AT&T's brief in opposition, either premature or involve matters as to which the Commission is strongly supported by long-established administrative practice. In addition, if the Court were to hold that the Commission's principal decision is invalid, there would be no need even to consider the issues presented by No. 77-1540. In these circumstances, any effort to review the issues presented there without also reviewing those involved here would prevent a full and meaningful evaluation of this controversy.

## CONCLUSION

For reasons set forth above, cross-petitioner urges that if, contrary to its submission, the petition for certiorari in No. 77-1540 were to be granted, this cross-petition should also be granted. If the petition in No. 77-1540 is denied, this conditional cross-petition should also be denied.

Respectfully submitted,

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